BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	**CC Docket No. 96-149**
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY

The issue in this proceeding is whether the Commission will promulgate rules consistent with the intent of Congress or whether it will take the self-interested lead offered by the IXC[1] competitors of the BOCs and modify the meaning of Congress' words in order to lessen competition and handicap certain parties. Congress legislated that all telecommunications markets are to be opened to competition. The Commission has stated that it intends through this proceeding to adopt "safeguards" to govern BOC affiliates' entry into certain new markets, and in particular, BOC affiliates' entry into the in-region, interLATA services market. The Commission must not, however, make itself a party to the dismantling of the deregulatory and procompetitive goals of 1996 Act. Although some commenters urge the Commission to adopt rules and regulations over and above the requirements of the 1996 Act, no commenter points to any authority to promulgate such rules. The Commission must simply take up its authority and responsibility to enforce the requirements included in Section 272, not adopt rules that expand its requirements.

In evaluating the structural and transactional requirements of Section 272, the Commission must remember that Section 272 affiliates cannot begin to offer services until this Commission determines the affiliated BOC's compliance with Sections 251, 252, and 271. The existing safeguards that currently bind BOCs' activities, combined with Section 272's express structural and non-structural safeguards, and ensure that a BOC interLATA affiliate could do no harm to competition.

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[1]The abbreviations used in this summary are the same as those used in the text of the Reply Comments.

It is the structural relationship between the BOC and its Section 272 affiliate and the transactional fairness in their dealings, particularly when compared to the relationship between the BOC and the BOC affiliate's competitors, that is subject to scrutiny under Section 272. Section 272 requires the establishment of an affiliate separate from the BOC for the provision of in-region interLATA services and manufacturing and places certain limitations upon their joint activities. Section 272 does not empower the Commission to micromanage the internal business organization of BOCs, their parents, or their affiliates.

Any rules issued by the Commission should be limited so as not to encroach upon the deregulatory freedoms established by the 1996 Act. Limitations contained in Section 272 (b) are clear on their face and provide the manner in which it can be determined whether BOCs and their required affiliates are sufficiently independent. The limitations in Sections 272 (c) and (e) provide the sort of non-discrimination protections the Commission has traditionally advocated in other contexts. The Section 272 safeguards, together with those resulting from BOCs' compliance with Sections 251, 252, and 271, provide the same or a greater quality of access to telecommunications carrier and facilities than was envisioned under Computer III and eliminate the need for the generation of additional safeguards.

Sections 272 (b), (c), and (e) are not a basis for the far-reaching prohibitions proposed in some portions of the NPRM and advocated by some commenters. In particular, Section 272 (b)(3) says nothing about third parties and nothing about whether services can be provided by one affiliate to another; it simply requires "separate officers, directors and employees." Further, and contrary to the arguments of some commenters, each BOC can operate independently and still provide services to a required separate affiliate consistent with the 1996 Act.

Moreover, the language of Sections 272(c), (d), and (e) contemplates that the BOC will provide a number of services to its required separate affiliate. Any rule prohibiting such BOC-provided services would render the requirements contained in Sections 272(c), (d), and (e) superfluous. The Commission should, therefore, model its rules, if any, relating to separate employees in accord with the plain language of the remainder of Section 272, and permit BOC affiliates to contract with BOCs for all types of "in-house" type services on a cost-reimbursement basis.

BOC competitors have now begun to provide "one-stop shopping." BOCs and their separate affiliates must be permitted to follow suit. However, some commenters seek to have the Commission limit the pro-competitive nature of "one-stop shopping" and the joint marketing provisions of Section 272(g). AT&T advocates a narrow definition of "jointly market" as used in Section 271(e)(1). AT&T's definition would endow AT&T with a greater ability to jointly provide local and interexchange services. At the same time, AT&T's proposed definition would hamstring the BOCs' ability to provide "one-stop shopping" under Section 272(g)(2). AT&T accomplishes this by defining the term "marketing" as limited to the initial sale of services or products. AT&T's definition of joint marketing is artificial and deliberately ignores the nature of how telecommunications services are provided today.

At a minimum, whatever action the Commission takes, it must permit the BOCs and their affiliates to jointly market local and interexchange service so that they are not prohibited from offering comparable products to those carriers not restricted under Section 272. In addition to expressly permitting joint marketing among the BOC and the BOC interLATA affiliate, the 1996 Act contemplates the BOC/BOC-affiliate joint marketing will occur on a timetable that is the

same as that extended to IXCs entering the local exchange business. "Parity" in timing is essential to the balance struck in the 1996 Act.

In addition, and contrary to some comment, no additional reporting requirements need be imposed. Section 272 neither imposes nor authorizes a never-ending audit process.

Some commenters suggest that BOC interLATA affiliates should be shackled by dominant carrier regulation that is presently applicable to no carrier. However, before a BOC affiliate is permitted to offer in-region interLATA services, the Commission will have determined that the BOC's network has been opened to make it possible for competition to occur. Any dominant carrier regulations will only serve to delay or impede a BOC affiliate's efficient provision of interexchange services. This would result in the denial of the additional consumer benefits that will accompany BOC affiliate competitive entry.

Applying the Commission's market power analysis to any separate BOC-affiliate new entrant, the Commission must determine that it has no market power in the provision of interstate, interexchange services, regardless of the geographic market definition. With regard to international services, neither the Commission nor any commenter explains why the existing rules adopted to handle the regulatory treatment of United States carriers on international routes, particularly those dealing with "affiliations," are insufficient to deal with potential problem areas. The Commission has already stated in other contexts that it will deal with "special conditions" in the foreign carrier context, and comments that seek to have BOC international services regulated on a dominant basis are thinly-veiled attempts to forestall competition.

In summary, this Commission must not impose on the BOC-affiliate IXCs a dominant carrier regime to which no others are subjected.

Contrary to the comments of some, the 1996 Act did not in any way envision a swift and unfair exit mechanism under Section 271(d)(6) when it crafted the legislation providing for BOC affiliates to provide robust competition in interLATA services. The NYNEX approach to the procedural aspects of a Section 271(d)(6) complaint proceeding is, therefore, correct.

Finally, there is no basis on which to conclude that a BOC's provision of an intraLATA Internet access service, which simply allows the consumer to connect to an ISP's POP inside the LATA using the traditional local loop, is the provision of an interLATA information service. Contrary to MFS's comments, a BOC's provision of local access service to customers who wish to call an ISP does not place the BOC in the position of being a provider of interLATA information services under the 1996 Act. The Commission should not allow this proceeding to be twisted into an improperly noticed proceeding on the Internet.

The Commission must read Section 272 to harmonize its burdens and benefits. Harmony can be brought only through a balanced reading of Section 272's separate affiliate, non-discrimination, and joint marketing provisions that permit BOCs and their affiliates to compete fairly with the IXCs through creative joint marketing mechanisms on par with BOC competitors.

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REPLY COMMENTS OF SBC COMMUNICATIONS INC.[1]

I. INTRODUCTION

The issue in this proceeding is whether the Commission will promulgate rules consistent with the intent of Congress or whether it will take the self-interested lead offered by the interexchange carrier ("IXC") competitors of the Bell operating companies ("BOCs")[2] and

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[1]SBC Communications Inc. ("SBC"), one of the Regional Bell operating companies ("RHCs") files these Reply Comments by its attorneys and on behalf of its subsidiaries, including Southwestern Bell Telephone Company ("SWBT"), Southwestern Bell Communications Services, Inc. ("SBCS"), and Southwestern Bell Mobile Systems, Inc. ("SBMS") in response to Comments filed pursuant to the Commission's Notice of Proposed Rulemaking released on July 18, 1996 (the "NPRM").

[2]The term "Bell operating company"--

> (A) means any of the following companies: Southwestern Bell Telephone Company [and other enumerated incumbent local exchange carriers] . . . ; and
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> (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but
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> (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

47 U.S.C. §153(4). (emphasis added) BOCs are, therefore, both local exchange carriers

modify the meaning of Congress' words in order to shackle BOCs. Congress intended and explicitly legislated that all telecommunications markets are to be opened to competition. The Commission has stated that it intends through this proceeding to adopt "safeguards" to govern BOC affiliates' entry into certain new markets, and in particular, BOC affiliates' entry into the so-called in-region, interLATA services market. However, should the Commission adopt the rules some commenters suggest in response to the NPRM, it will make itself a party to the dismantling of the deregulatory and procompetitive goals of Section 272 of the Telecommunications Act of 1996 (the "1996 Act").[3]

Many commenters urge the Commission to adopt more rules and regulations than are required by of the 1996 Act; yet, no commenter points to any authority to promulgate such rules. While the Commission has the authority and the responsibility under the Communications Act to enforce the requirements included in Section 272, it is not authorized to adopt rules that expand the requirements of Section 272.

At most, the Commission must track the express language of the 1996 Act and invoke Congressional intent: a balanced approach to competition. Separate affiliates are required, and non-discrimination safeguards are imposed, but coordinated activities, shared services, and joint marketing are permitted.

("LECS") (47 U.S.C. §153(26) and incumbent local exchange carriers ("ILECS") (47U.S.C.§252(h)).

[3]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified at 47 U.S.C. §§ 151 et seq. (all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code). The 1996 Act amended the Communications Act of 1934 (Communications Act).

Section 272 contains all of the structural requirements to which BOC affiliates may be subjected in the provision of manufacturing, certain interLATA telecommunications services, and interLATA information services (other than electronic publishing, governed by Section 274, and alarm monitoring services, governed by Section 275). Nothing in the 1996 Act permits or requires the straightforward standards contained in Section 272 to be a springboard for the Commission to adopt additional structural or non-structural requirements as some commenters suggest, or to retrofit structural separation requirements written for a vastly different industry and another time. The Commission's duty is to enforce the Congressional standards to effectuate the 1996 Act's principles in support of de-regulation and the "opening [of] all telecommunications markets to competition."[4] If the Commission takes the lead of commenters that rewrite the 1996 Act more to their liking, it will topple the carefully crafted legislation and fail to effectuate the will of Congress.

II. DISCUSSION

The essence of this proceeding is that the Commission implement Congress' intent in Section 272. Section 272 defines completely the relationship between a BOC and its affiliated providers of interLATA telecommunications services and interLATA information services (other than alarm monitoring and electronic publishing) and its manufacturing affiliate. Contrary to the suggestions of some commenters, even if there was a reason to do so, the Commission cannot expand upon the requirements of Section 272.

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[4]See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) ("Joint Explanatory Statement"); see also 47 U.S.C. §706(a).

A. EVEN WITHOUT ADDED "SAFEGUARDS," COMPETITION REMAINS SHIELDED BY THE 1996 ACT, EXISTING NON-STRUCTURAL SAFEGUARDS, AND POWERFUL COMPETITORS [Section III]

In evaluating the structural requirements of Section 272, the Commission must be mindful that Section 272 affiliates cannot begin to offer services until this Commission determines the affiliated BOC's compliance with Sections 251, 252, and 271. Under those sections, the Commission is bound to permit the BOC Section 272 affiliate's entry when it finds that the BOC provides access and interconnection to a facilities-based competitor or has an approved and conforming statement of general terms and conditions for access and interconnection.[5] To be acceptable, the access to and interconnection with the BOC's network must comply with the "Competitive Checklist," which is more expansive and detailed than anything required under Computer III[6] or the Interim Waiver Order.[7] In addition, BOCs are, and

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[5]Section 271(c)(1)

[6]See Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer III"), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("Phase I Order"), recon., 2 FCC Rcd 3035 (1987) ("Phase I Reconsideration Order"), further recon., 3 FCC Rcd 1135 (1988) ("Phase I Further Reconsideration Order"), second further recon., 4 FCC Rcd 5927 (1989) ("Phase I Second Further Reconsideration Order"); Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) ("California I"); Phase II, 2 FCC Rcd 3072 (1987) ("Computer III Phase II Order"), recon., 3 FCC Rcd 1150 (1988) ("Phase II Reconsideration Order"), further recon., 4 FCC Rcd 5927 (1989) ("Phase II Further Reconsideration Order"); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) ("ONA Remand Order"), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) ("California II"); BOC Safeguards Order, 6 FCC Rcd 7571 (1991), vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) ("California III"), cert. denied, 115 S. Ct. 1427 (1995).

[7]In the Matter of Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, 10 FCC Rcd 1724 (1995).

may continue to be, subject to the Commission's accounting and non-discrimination safeguards, including its affiliate transaction rules, joint cost orders, and price cap regulation.

Against this backdrop, it must also be remembered that BOC affiliates' IXC competitors hold 100% of the existing interLATA market and include numerous large and well-financed companies. As the Commission determined in the AT&T non-dominance proceeding, the interexchange market has matured to the point that it could withstand the worst that even its largest competitor could conceivably dish out.[8] The existing safeguards combined with Section 272's express structural and non-structural safeguards ensure that a newborn BOC interLATA affiliate could do no harm to competition.

B. SECTION 272 SERVES TO REGULATE THE NON-ACCOUNTING RELATIONSHIPS BETWEEN THE BOC AND ITS SECTION 272 AFFILIATE [Sections III and IV]

It is the structural relationship between the BOC and its Section 272 affiliate and the transactional fairness in their dealings, particularly when compared to the relationship between the BOC and the BOC affiliate's competitors, that is subject to scrutiny under Section 272. Very simply, Section 272 provides only that a required separate affiliate:

(1) shall operate independently from the Bell operating company;

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

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[8]See In the Matter of Motion of AT&T Corp. to Be Re-Classified as a Non-Dominant Carrier, Order, FCC 95-427 (October 23, 1995) ("AT&T Order").

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.[9]

No other structural or transactional requirements are applicable.

1. THE STRAIGHTFORWARD LANGUAGE IN SECTION 272 INVOKES LIMITED SEPARATION [Section IV]

Section 272 requires the establishment of an affiliate separate from the BOC for the provision of in-region interLATA services and manufacturing and places certain limitations upon their joint activities. Section 272 does not empower the Commission to micromanage the internal organization of BOCs or their parents or affiliates. Contrary to the Commission's discussions and tentative conclusions in the NPRM, this is particularly true with regard to independent operations and shared services.

In light of the clear and limited requirements of Section 272, the Commission's pervasive proposed regulations reach well beyond the plain meaning of the legislation and cannot serve as the benchmark against which structural safeguards are measured. Nevertheless, many commenters, including several IXCs and IXC-sponsored industry groups (potential competitors of the separated BOC affiliates),[10] adopt the Commission's expansive misconstruction of the 1996 Act or even inflate it. The arguments of commenters that have attempted to shoe-horn into the proposed rules a more expansive set of requirements than set forth in Section 272 were heard

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[9]Section 272(b).

[10]Comments of Time Warner Cable at 2; MFS Comments at 2; MCI Comments at 2; ITAA Comments at ii-iii.

by Congress and rejected prior to the passage of the 1996 Act. The straightforward language of Section 272(b) speaks volumes about the limited nature of the separation requirements. As set forth above, reading subsection (b) with the rest of Section 272, especially subsection (g), requires that any rules issued by the Commission be limited so as not to encroach upon the deregulatory freedoms established by the 1996 Act.

2. RHCS ARE PERMITTED TO ORGANIZE JUST AS ANY OTHER BUSINESS: EFFICIENTLY [Sections III and IV]

There is a degree of expertise within the BOCs' holding companies and their affiliates that may be useful to the required separate subsidiaries on an intermittent basis. If it were Congress' intent to create a "Chinese Wall" among affiliates sharing a common parent, it would have stated as much. In fact, Congress anticipates that the BOC and the required separate affiliate will ultimately be rejoined, barring Commission action to the contrary.[11] This vision of the future dictates that any required separation be limited. To avoid imposing an anticompetitive requirement on the BOCs, the Commission should not institute a general prohibition against sharing of administrative services with the required separate affiliate.

It is with this perspective that the Commission must avoid limiting how entities such as RHCs are organized, save for the limitations explicitly required by Section 272(b).[12] Certain corporate functions are appropriately performed at either the holding company level or in subsidiaries designated by the holding company. RHCs are publicly-held enterprises and as

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[11]Section 272(f).

[12]Examples of other corporate structures that are permissible under the 1996 Act are advocated in the NYNEX Comments at Sections III. and IV. and the Bell Atlantic Comments at Sections III. and IV.

such have fiduciary duties to their shareholders to organize themselves in an efficient manner. There is no evidence of Congressional intent to prohibit compliance with this fiduciary obligation. The BOC and those entities providing services described in Section 272(a) must operate independently, but there is no justification for rules that go beyond the explicit dictates of Section 272(b).

Moreover, permitting entities such as RHCs to organize themselves as other public companies do is consistent with sound business principles. Economic efficiencies result from a lack of duplicative administrative services. Consistency of policies, strategies, and employee relations, for example, lower the cost structure for all operating subsidiaries, increasing the competitiveness of each business. Creating such efficiencies requires coordination and supervision at the holding company or service organization level as well as the operating company level. Limitations contained in Section 272(b) are clear on their face and provide the manner in which it can be determined whether operating companies are sufficiently independent. The limitations in Sections 272(c) and (e) provide the sort of protections the Commission traditionally advocated. These subsections are not a basis for the extraordinary requirements such as those proposed in Paragraphs 62 and 92 of the NPRM.

3. STRAINED INTERPRETATIONS FAIL TO EFFECTUATE CONGRESSIONAL INTENT [Section IV]

MCI would have the BOCs share neither employees nor most third-party vendors.[13] Comparing the uncomplicated "separate officers, directors, and employees" language in Section 272(b)(3) with the tortured details of MCI's proposed rule (e.g., that only services outsourced

[13] See MCI Comments at 27-29.

prior to the 1996 Act's passage can be outsourced today), it can only be concluded that MCI is attempting to re-lobby a proposal rejected during the legislative process, not reading the straightforward language of the 1996 Act.

Section 272(b)(3) says nothing about third parties and nothing about whether services can be provided by one affiliate to another; it simply requires "separate officers, directors and employees." Those who believe such a requirement is ineffective for their purposes are free to petition Congress. They should not couch their views in artificial or contrived analysis in a Commission proceeding.

Going a step further, AT&T and other commenters suggest an interpretation of Section 272(b)(1) and (3) that eliminates all activities necessary and proper to operate efficiently within a modern corporation.[14] Citing the legislative history of the 1996 Act, AT&T incorrectly assumes the H.R. 1555 Section 246(c) subtitle requirement of "fully separate operations and property" is somehow a guiding principle in Section 272.[15] In fact, Section 272 of the 1996 Act is in many respects indisputably less restrictive on the combined operations or shared services or property than H.R. 1555. H.R. 1555 Section 246 prohibited "joint ventures" and "partnerships" and prohibited the common ownership of transmission or switching facilities and the joint ownership of property of any other kind, not only with its BOC, but also between the affiliate and "the BOC or any affiliate thereof."[16] In contrast to H.R. 1555 Section 246, Section 272 permits transactions, subject only to an arm's length requirement and that the transactions be

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[14]AT&T Comments at 18-26; MCI Comments at 22-30.
[15]AT&T Comments at 24.
[16]House Report on H.R. 1555, Rept. No. 104-204 (July 24, 1995) ("House Report") at 10.

reduced to writing. The H.R. 1555 Section requirement was, therefore, more extreme than the simple language contained in Section 272(c) and (e).

Contrary to the spin placed upon H.R. 1555 by AT&T, the removal of the restrictions on joint activities, partnerships, and joint ownership, and the modification of the ownership and transactional requirements, evolved the potential BOC/BOC affiliate relationship from one that broadly prohibited joint activities and shared use to a relationship that, subject to certain "Structural and Transactional Requirements"[17] (and in certain circumstances, non-discrimination requirements), permits those activities.

4. THE 1996 ACT ALLOWS THE BOC TO PROVIDE SERVICES TO THE REQUIRED SEPARATE SUBSIDIARIES [Section IV]

Each BOC can operate independently and still provide services to a required separate affiliate consistent with the 1996 Act. The language of Sections 272 (c), (d), and (e) contemplates that the BOC will provide a number of services to its required separate affiliate. Any rule prohibiting such BOC-provided services would render the requirements contained in Sections 272(c), (d), and (e) superfluous, a result contrary to generally-accepted statutory construction principles. Provided the arrangements are compensatory and non-discriminatory, the BOC affiliate may deal directly with the BOC in the provision or procurement of any type of goods, services, facilities, or information.[18] Further, it is nonsensical and extra-statutory to suggest that BOCs must provide administrative functions, such as professional services, to competitors. There is, therefore, no basis for a rule prohibiting the exclusive provision of certain

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[17]Section 272(b).
[18]See Sections 272(c), (e).

administrative services by the BOC to the required separate subsidiaries, as the Commission acknowledges are available even under Computer II "maximum separation," assuming there is compliance with all affiliate transaction reporting and accounting requirements.

5. SECTION 272 IS NOT "MAXIMUM SEPARATION" [Section IV]

Although certain commenters contend that these requirements somehow invoke the "maximum separation" requirements of Computer I or Computer II, they are, in fact, much more limited.[19] The most fundamental difference between Computer II "maximum separation" and the structural separation required by Section 272 is that maximum separation prohibits all BOC joint or agency marketing, sales, or other coordinated activities of BOC affiliated enhanced services. Section 272 separation permits all of these activities (although some activities are subject to non-discrimination safeguards). A separated affiliate may purchase from the BOC or any other BOC parent or affiliate any needed administrative functions, including all of the functions recited in paragraph 62 of the NPRM as prohibited. The legislative history of Section 272 is exceedingly brief; it is also silent on the question of shared services, permitting no inference that the BOC is barred from providing administrative and other services to the required separate affiliate. The Commission should, therefore, model its rules, if any, relating to separate employees in accord with the plain language of the remainder of Section 272, to permit BOC affiliates to contract with BOCs for all types of "in-house" type services on a cost-reimbursement basis.

[19]AT&T Comments at 25,27; TRA Comments at 13-14; Excel Comments at 4-8.

C. COMPUTER III SAFEGUARDS HAVE BEEN EFFECTIVE AND ARE COMPARABLE IN FUNCTION TO SECTION 272 [Section III and IV]

Section 272, together with Sections 251, 252, and 271, contain provisions sufficient to eliminate the need for the generation of additional safeguards. While Computer III safeguards are applicable only to BOC integrated provision of enhanced services,[20] the Commission's Computer III non-structural safeguards require functionally the same dealings with affiliates as Section 272(c)(1) (i.e., the BOC may not discriminate between the affiliate and any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards). A comparison illustrates the point:

- CEI

  Under the Comparably Efficient Interconnection ("CEI") requirements of Computer III, BOCs are required to offer the same basic services they offered to their affiliates to any other ESPs on terms and conditions equivalent to Section 272(c)(1). Under CEI, the BOCs must provide other ESPs the same quality of interconnection the BOCs use in providing their own enhanced services. CEI is comparable to the 1996 Act checklist and unbundling requirements.

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[20] See Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer III"), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("Phase I Order"), recon., 2 FCC Rcd 3035 (1987) ("Phase I Reconsideration Order"), further recon., 3 FCC Rcd 1135 (1988) ("Phase I Further Reconsideration Order"), second further recon., 4 FCC Rcd 5927 (1989) ("Phase I Second Further Reconsideration Order"); Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) ("California I"); Phase II, 2 FCC Rcd 3072 (1987) ("Computer III Phase II Order"), recon., 3 FCC Rcd 1150 (1988) ("Phase II Reconsideration Order"), further recon., 4 FCC Rcd 5927 (1989) ("Phase II Further Reconsideration Order"); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) ("ONA Remand Order"), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) ("California II"); BOC Safeguards Order, 6 FCC Rcd 7571 (1991), vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) ("California III"), cert. denied, 115 S. Ct. 1427 (1995).

- Non-Discrimination Reports

  Parallel to Computer III, Section 272's nondiscrimination reporting and audit requirements are designed to allow the Commission to determine whether the BOCs are providing the same quality of service to competitors as used in the BOCs' own enhanced services.

- Network Disclosure

  The parallel network disclosure rules require that the BOCs give at least six months notice to competitors of new or modified network services affecting interconnection for enhanced services functionally equivalent to Section 272.

- CPNI

  In order to ensure that access to customer information is available, the Commission adopted rules in Computer III to regulate the way information from the LEC is used in the marketing of enhanced services. The 1996 Act contains specific CPNI requirements.[21]

- ONA

  The "open network architecture" ("ONA") of Computer III was originally conceived to serve the same purpose as the even more granular unbundling required by Section 251. The ONA policy requires LECs to incorporate CEI concepts into the overall design of their basic service networks. ONA rules require LECs to respond to requests for interconnection to the network for the provision of enhanced services, even if the LEC does not use the network itself for provisioning enhanced services. In Computer III, the Commission concluded that ONA, based on new technology to permit fundamental unbundling, would be a key nonstructural safeguard in preventing access discrimination as effectively as structural separation. Based on that conclusion, the Commission determined that the benefit of maintaining structural separation to prevent discrimination was minimal.

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[21] See Section 222.

> In CC Docket No. 96-98 First Report and Order,[22] the Commission goes far beyond ONA in mandating fundamental unbundling of the network. If the Commission's logic that such unbundling is a key safeguard in preventing discrimination, then the unbundling requirements in the First Interconnection Order fit that safeguard.

Given that the 1996 Act provides access, interconnection, and non-discrimination requirements to a degree that dwarfs Computer III CEI and ONA, there is no need to overlay Computer III rules on top of the 1996 Act's requirements. The Section 272 safeguards, together with those resulting from BOCs' compliance with Sections 251, 252, and 271, provide the same or a greater quality of access to telecommunications carrier services and facilities than was envisioned under Computer III.

D. SECTION 272'S AUDIT PROCESS IS NOT INTENDED TO BE BURDENSOME [Section VII]

1. THE EXISTING ACCOUNTING SAFEGUARDS ARE SUFFICIENT AND THE NEW AUDIT PROCEDURES NEED NO SUPPLEMENTATION

The existing affiliate transaction and cost allocation rules and safeguards have been tested and affirmed through numerous Commission orders. Still, some commenters would take the audit provisions of Section 272 and turn them into a highly-regulatory regime to burden the BOCs.

Overall, the Commission's collective nonstructural safeguards have proven sufficient to allay discrimination concerns in the new competitive environment. But even if they had not,

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[22] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order and Memorandum Opinion and Order, released August 8, 1996, paras. 165-260 ("First Interconnection Order").

they have been effectively augmented through the 1996 Act with the unbundling, resale, and CPNI provisions, and BOC affiliate entry into interLATA, electronic publishing, and other ventures is low risk.

2. THE SECTION 272 AUDIT PROCESS IS A SUFFICIENT SAFEGUARD WITHOUT ADDITIONAL REPORTING

Despite the evident and abundant success of the Commission's existing BOC non-structural safeguards, some commenters would pile on additional multiple, continual reports of the BOC and its Section 272 affiliates' activities--both joint and separate.[23] Section 272(d) provides a more-than-adequate set of accounting safeguards in the form of "biennial audit" procedures, as follows:

a. A joint federal/state audit is to be conducted every two years by an independent auditor to determine whether a company required to operate a separate affiliate under this section has complied with the Section 272 rules, particularly the separate accounting requirements;

b. Results are to be submitted to the Commission and to the appropriate state commissions and subject to public inspection;

c. The auditor, the Commission, and appropriate state commissions' access to financial accounts and records of each company and its affiliates to verify transactions that are relevant to the activities permitted under this section;

d. The Commission and state commissions are to have access to the working papers and supporting material of auditors; and

e. The appropriate commissions are to implement procedures to ensure protection of proprietary information submitted under the Section 272 audit requirement.

The scope and nature of these audits are functionally the same as the CAM audit required under the Computer III nonstructural safeguards as codified in 47 C.F.R. §64.904. Contrary to certain

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[23] See, e.g., MCI Comments at 50.

comments,[24] Section 272 does not impose a never-ending audit process that is to be conducted annually by casts of numerous commission auditors, but instead institutes a narrowly-defined audit to be conducted by an independent audit firm on a biennial basis.[25]

E. JOINT MARKETING IS PERMITTED UNDER THE 1996 ACT, MUST NOT BE UNDERCUT BY THE COMMISSION'S REGULATIONS, AND IS ESSENTIAL TO THE INDUSTRY [Section VI]

1. ALL PROVIDERS MUST BE AT PARITY IN JOINT MARKETING [Section VI]

Section 272(g) permits joint marketing. The potential economies of scope of combined activities, such as those resulting from more efficient production and lowered transaction costs, are valid public interest results of the legislation. BOC competitors have now begun to provide one-stop shopping, and BOCs and their separate affiliates must be permitted to follow suit. In addition to expressly permitting joint marketing among the BOC and the BOC interLATA affiliate, the 1996 Act contemplates the BOC/BOC-affiliate joint marketing will occur on a timetable that is the same as that extended to IXCs entering the local exchange business. This "parity" in timing is essential to the balance struck in the 1996 Act.[26] To effectuate Congressional intent, BOCs must not be subjected to unintended rules that result in significant competitive disadvantage.

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[24] See TCG Comments at 15-18.

[25] Further comment regarding the compliance review requirements in Section 274 will be provided in response to CC Docket No. 96-152.

[26] Compare Section 272(g) with Section 271(e). See also Senate Report on S.562 (Report No. 104-230)(March 30, 1995) at 23, 43 ("the Committee intends [that] parity [exist] between the Bell operation companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications").